

Exhibit 44

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 U.S. COMMODITY FUTURES TRADING
4 COMMISSION,

5 Plaintiff, New York, N.Y.
6 v. 13 Civ. 1174 (VSB)

7 WILLIAM BYRNES, et al.,
8 Defendants.
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9
10 October 20, 2016
11 11:45 a.m.

12 Before:

13 HON. VERNON S. BRODERICK,
14 District Judge
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APPEARANCES

COMMODITY FUTURES TRADING COMMISSION

BY: PATRYK J. CHUDY

DAVID W. MacGREGOR

HERSKOVITS, PLLC

Attorneys for Defendant Byrnes

BY: JOSEPH P. ALLGOR

MENAKER & HERRMANN, LLP

Attorneys for Defendant Curtin

BY: SAMUEL F. ABERNETHY

WOJCIECH JACKOWSKI

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

Attorneys for Defendant NYMEX

BY: PATRICK FITZGERALD

ALBERT L. HOGAN, III

MARCELLA LAPE

BRACEWELL, LLP

Attorneys for Defendant Eibschutz

BY: PAUL L. SCHECHTMAN

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(Case called)

THE DEPUTY CLERK: Counsel, please state your appearance for the record.

THE COURT: Just a couple of housekeeping matters. Number one, it occurred to me fairly far into this case -- I didn't know -- so, there are a lot of people who are actually familiar faces but I had actually done some work for NYMEX back in 2008, it amounted to 4.8 hours over two days in April -- April 14th and 15th of 2008. I had asked -- once it came to me that I had done some work I asked my former firm, Weil Gotshal, to run a search of the various names that appear, that are relevant in this case, and none of the names popped up. So, the information predates, as least as far as I know, predates anything having to do with this case so I don't think there is an issue but I am raising it for the parties just so that -- obviously, you folks know a lot more about the case than I do but my reading of the case is that any of the activity occurred after the 2008 time period.

The second thing is, and I am not sure whether this is something -- I think this is the first time we are meeting face to face. I have worked with both Mr. Fitzgerald and Mr. Shechtman at the U.S. Attorney's office. Mr. Shechtman was Chief of the Criminal Division for a number of years while I was in the office. Mr. Fitzgerald and I worked as line assistants together. I don't think we ever had any cases

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1 together. Again, I don't think that is an issue. I just
2 couldn't remember whether that is something that had come up
3 previously. And I think, am I correct, Mr. Shechtman, that you
4 only recently appeared for Mr. Eibschutz; is that right?

5 MR. SHECHTMAN: I think I have been active only
6 recently, your Honor. I think that's fair to say.

7 THE COURT: Okay. I apologize now because I don't
8 think we went through and had everybody identify themselves for
9 the record. First of all, does anybody have any issue with the
10 disclosure that I have made? Obviously do your research and if
11 there is something, just bring it to my attention.

12 MR. CHUDY: Good afternoon, your Honor. Patryk Chudy
13 for the CFTC. We don't foresee any issues with the disclosures
14 you have and I understand you also worked with our Director of
15 Enforcement Aitan Goelman.

16 THE COURT: Oh, yes, I forgot about Aitan -- as did
17 some of these folks here also. Yes, that's right. Mr. Goelman
18 and I, just to give a little bit more color with regard to
19 Mr. Goelman, Mr. Goelman -- I was Chief of the Violent Gangs
20 Unit and Mr. Goelman was line assistant in that unit so I
21 supervised him and the cases he worked on. Again, I don't view
22 that as an issue, but thank you for bringing that to my
23 attention. I had forgotten about that.

24 MR. CHUDY: Thank you, your Honor.

25 THE COURT: Okay, and it is Mr. MacGregor?

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1 MR. MacGREGOR: Yes, your Honor.

2 THE COURT: For the defense? You can go whichever
3 side wants to go first.

4 MR. ABERNETHY: Your Honor, Samuel Abernethy for
5 Mr. Curtin. We have no objection with the disclosures you just
6 made.

7 MR. JACKOWSKI: Wojciech Jackowski, also of Menaker &
8 Herrmann for defendant Curtin.

9 THE COURT: Okay.

10 MR. FITZGERALD: Good afternoon, your Honor. Pat
11 Fitzgerald joined by Marcella Lape and Albert Hogan from
12 Skadden Arps, and no objection. Thanks.

13 THE COURT: All right.

14 MR. SHECHTMAN: Paul Schechtman for Mr. Eibschutz. No
15 objection.

16 MR. ALLGOR: Your Honor, Joseph Allgor for Defendant
17 William Byrnes. No objection.

18 THE COURT: Obviously if that changes, as I mentioned,
19 that's fine. Just let me know. And if you want to work out a
20 procedure such that I don't, if there is some issue such that I
21 don't know what parties are raising the issue, speak to each
22 other and come out with a process. My understanding is
23 sometimes when this happens it is done just to avoid any
24 issues. So, feel free to do it anonymously, for lack of a
25 better term.

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1 Let me review for the parties the documents I have in
2 connection with today's pre-motion conference. I have the
3 October 10th letter from the CFTC. I have responses from
4 Mr. Byrnes on the 13th of October, from NYMEX on the 13th of
5 October, and from Mr. Curtin on the 13th of October. I also
6 have Defendants Byrnes and Curtin premotion letter which is on,
7 again, October 10th for both Mr. Byrnes and Curtin; and the
8 CFTC's response on October 13th; and NYMEX' pre-motion letter
9 on the 10th and CFTC's response on the 13th.

10 Am I missing any correspondence in connection with
11 today's conference?

12 MR. CHUDY: No, your Honor.

13 MR. FITZGERALD: No.

14 THE COURT: All right. I do have some questions.
15 Often one of the rationales for having a pre-motion conference
16 is to sort of vet and hopefully provide some direction to the
17 parties concerning where I think there may be certain legal
18 issues that I would like the parties to focus on. But, as I
19 understand it, let me first address, I noted in Mr. Curtin's
20 response that there was an assertion that the information that
21 he disclosed was not public.

22 Is that an accurate assessment or statement?

23 MR. ABERNETHY: That's accurate, your Honor.

24 Would you like me to stand?

25 THE COURT: This goes for everyone: You can stand or

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1 remain seated, but the only thing I ask is that if you stand or
2 remain seated that you pull the microphone close to you so that
3 the court reporter can take down everything.

4 MR. ABERNETHY: That would be difficult for me, your
5 Honor, if I were to remain standing.

6 THE COURT: Yes. So that's fine. You can do it from
7 a seated position. I just ask that you pull the microphone
8 close to you.

9 Just explain for me, because as I was reading the
10 letter it references that it was information that was public
11 but then it references that it was the expert that had been
12 retained by you that at least provided some of that
13 information. I just want to get a sense of what the argument
14 would be and then get the CFTC's response because, obviously,
15 if it is considered public information, that creates an issue.

16 Go ahead.

17 MR. ABERNETHY: Our client is in the unique position
18 of the trade information that was disclosed by Mr. Curtin
19 having been about trades that were brokered, that is a voice
20 broker function as an intermediary between traders and
21 potential traders prior to a trade having been disclosed. In
22 that process the information about the trade is well known in
23 the marketplace and because of that, we maintain, and as
24 explained by our client's expert Mr. Silvay, we think we are in
25 a position to argue that there should be summary adjudication

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1 on the grounds that this information was public.

2 Perhaps I can spend a moment or so to explain how the
3 over-the-counter market operates. Would that be useful to the
4 Court?

5 THE COURT: In particular, in connection with your
6 phrase "well known in the marketplace," what does that actually
7 mean?

8 MR. ABERNETHY: Well, the information either was
9 known, that is, the information about the trade, the price, the
10 quantity and the party that traded was either known or was
11 readily available in the marketplace. Let me take a moment to
12 describe the operation of the over-the-counter market.

13 It is not a centralized market with a bricks and
14 mortar presence. It is one in which traders are at their
15 offices and they communicate with each other by telephone
16 either directly or through the use of brokers who are known as
17 voice brokers. Voice brokers will call around to solicit
18 interest in a trade to multiple parties and in that process
19 they will often disclose, usually disclose either in that
20 solicitation process or at a later date, the identity of the
21 party involved. There are various reasons why the identity
22 needs to be known. A trading firm may have some restrictions
23 on how many trades or how large a position they can have
24 opposite a given firm. Ultimately they may have concern about
25 whether or not the counter-party is creditworthy.

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1 So, the identity of a party is circulated in the
2 marketplace through this over-the-counter brokering process.
3 And, accordingly, when a trade is consummated in this
4 relatively small, professional market of natural gas and
5 commodities traders, the information is known -- the identity,
6 the price, the structure, and so on. And, if it isn't known by
7 a particular trader, it can be readily available which is part
8 of the definition of "available to the public." And our expert
9 Mr. Silvay has explained that process. This is a commercially
10 necessary component of the operation of the over-the-counter
11 market. Our client is in the unique position of having given
12 out information that relates only to broker trades. It is also
13 possible in the over-the-counter market that principals can
14 talk directly to each other and consummate a trade. And in
15 those circumstances, the information may or may not get around
16 in the marketplace.

17 So, it is our contention that this information is in
18 the marketplace and therefore it is public and available to the
19 traders in the marketplace.

20 THE COURT: Well, in connection with any -- because I
21 didn't see any and I apologize if I missed it -- case law in
22 connection with that, in other words, what does the case law
23 say in terms of -- in this type of situation because, as I
24 understand it, it is not from your description and from my
25 reading of the letters it is not, for example, would I be able

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1 to go or would any individual in the public be able to go and
2 get access to the information?

3 MR. ABERNETHY: This is a professional -- first of
4 all, to respond to your comment about case law, I'm not aware
5 of any case law that addresses this particular issue.

6 THE COURT: Okay.

7 MR. ABERNETHY: This is a professionals market. The
8 relevant trading population is this group of people who are
9 industry professionals. As a practical matter, I don't think
10 you would be recognized by other participants in the market as
11 somebody that they would want to trade against so I think in
12 the over-the-counter market as opposed to Globex Electronic
13 Market operated by the Chicago Mercantile Exchange, I think in
14 this market realistically you would not be a participant in it.

15 THE COURT: So, I guess one of the issues that I would
16 like, obviously, is to just check to see whether either
17 necessarily in this industry but by analogy in another industry
18 where Courts have discussed what is considered non-public
19 information to determine whether or not this either fits within
20 or is outside of that information. I understand that you are
21 currently not aware of any case law. I am going to ask the
22 CFTC a similar question.

23 MR. ABERNETHY: I am familiar with the Mylett case
24 which deals with rumor in the marketplace but that is just
25 that, it is rumor, it is not commercially necessary, and I

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1 would distinguish that case from our situation.

2 THE COURT: Yes. Okay.

3 Let me hear from the CFTC on this particular issue.

4 MR. CHUDY: Thank you, your Honor. Patryk Chudy
5 again.

6 Your Honor, I think it is useful to point out a couple
7 of issues again which are not disputed. There is no dispute
8 that this information that Eibschutz was obtaining from Curtin
9 was not generally disseminated or published by NYMEX or
10 anywhere else. Eibschutz admitted that the information that he
11 was requesting for Curtin was non-public and repeatedly kept
12 asking for the information from Curtin as well as Byrnes
13 because he had no other source to obtain.

14 The mere fact that someone might be able to make a few
15 phone calls and try to see if people will tell him or advise of
16 some market rumors does not make that information generally
17 available to the trading public. We do believe this case is
18 more akin to a situation where there is some information, some
19 leaks or some rumors out in the market which does not take it
20 out of the category of non-public. What is more important to
21 look at, your Honor, is the fact that Curtin and Byrnes worked
22 at the Exchange and had the direct information and can
23 definitively confirm or deny whether the trades took place.
24 And the case law, your Honor, I think gives great weight to the
25 fact that insiders have that information as opposed to other

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1 rumors in the market.

2 Similar to what my defense counsel was suggesting, we
3 are not aware of any case law that would support their argument
4 that in this small, professionalized market that the ability to
5 make some phone calls and maybe find out, maybe not find out,
6 rises to the level of public information.

7 THE COURT: Although you are not aware of any
8 information that supports it, are you aware of case law that
9 suggests that simply that that would not qualify as publicly
10 available information? In other words, by analogy.

11 MR. CHUDY: I think the Mylett case that we cited,
12 your Honor, is what we would rely on.

13 THE COURT: The next question I have relates to what
14 is the CFTC's position with regard to the -- on the vicarious
15 liability issue with regard to NYMEX and what evidence would
16 you point to sort of demonstrate that Messrs. Byrnes and Curtin
17 were, that they were doing this, at least in part, for NYMEX.

18 MR. CHUDY: Your Honor, as you point out, as provided
19 there is at least a mixed motive that the disclosure served any
20 purpose of NYMEX, then vicarious liability attaches and the
21 discovery record has shown that Byrnes and Curtin were
22 repeatedly providing this information to Eibschutz while at
23 their work stations, during regular business hours, on recorded
24 lines that at some point they learned were recorded by NYMEX,
25 using NYMEX computer systems and, in addition, Byrnes, for

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1 example, in response to a NYMEX request to admit later in the
2 litigation indicated the information was disclosed to Eibschutz
3 "for the purpose of assisting Ron Eibschutz in building his
4 book of bills." They did not say, hey, I did this solely for
5 my only personal motives or for, unrelated to NYMEX' business.

6 THE COURT: I guess my question is Eibschutz -- how do
7 you pronounce his name?

8 MR. SHECHTMAN: I think that's fine, your Honor.

9 THE COURT: So, Mr. Eibschutz is providing information
10 so that he could benefit? How does that -- in other words, I
11 know there is reference to fees that NYMEX would have gotten
12 but how does the statement -- let's assume that Mr. Byrnes
13 provided Mr. Curtin the information to assist Mr. Eibschutz in
14 his business, in other words the cold calls and to get
15 additional work. How is that -- and I recognize that that
16 might generate fees for NYMEX but how is that -- is there any
17 other way that you are asserting that NYMEX was benefiting?

18 MR. CHUDY: Yes, your Honor; there is also a statement
19 which we referenced in our October 13th letter by Mr. Byrnes
20 where he had indicated in testimony in connection with an
21 unemployment hearing that he was told he could help the
22 customers and brokers with the questions that they had. So, as
23 we cited in that letter, helping NYMEX establish and bolster
24 their relationship with brokerage houses serves as an objective
25 of NYMEX. Also, as we cited in our letter, there is another

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1 example in the record where another marketing employee, for
2 example, was asked for confidential trade information by a
3 market participant. Now, this individual, by contrast,
4 declined to give out that information and the response that he
5 heard was, *come on, I'm trying to help you grow your business.*

6 So, by virtue of helping establish that brokerage
7 relationship that serves a purpose of NYMEX and we submit that
8 even if there was some personal motivation involved in Byrnes
9 and Curtin's disclosures, that doesn't take it outside the
10 scope of employment.

11 THE COURT: What did they say? In other words what
12 did Mr. Byrnes and Curtin say -- well, were they asked --
13 because, as I understand it, it sounds like it is conceded --
14 well, is it conceded that both Mr. Byrnes and Curtin
15 understood, putting aside whether or not that what they were
16 doing was a violation of the NYMEX rules? In other words, did
17 they, during their depositions or otherwise, did they concede
18 that they were concerned or at least knew that this could
19 jeopardize their jobs?

20 MR. CHUDY: From our reading, your Honor, yes, we
21 think it was, but if counsel has other views we are certainly
22 welcome to hear that.

23 THE COURT: Let me just check. Does any defense
24 counsel have any other views as to -- and obviously you don't
25 have the record in front of you and you are going to be

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1 preparing your motion so I understand, I'm not going to hold
2 you to it, but I just want, for purposes of today, does anybody
3 have any information that would suggest that that wasn't the
4 case?

5 Mr. Fitzgerald?

6 MR. FITZGERALD: As I understand it they were aware
7 that what they were doing was against the policy of NYMEX.

8 THE COURT: Yes.

9 MR. FITZGERALD: And to the dispositive question of
10 what their intent was -- I hope I quote it correctly -- my
11 understanding is they made an admission that this was not -- it
12 was done not for the purpose of conferring a benefit on NYMEX.

13 THE COURT: Okay.

14 MR. FITZGERALD: So, we think it is clear that it
15 wasn't done for that purpose and we think that's the
16 dispositive question.

17 THE COURT: I think the issue then, counsel, because
18 obviously you have the testimony of the individuals who are
19 defendants in this case so I think that's a piece of the
20 information, but what does the law say in terms of vicarious
21 liability in this situation?

22 The mere fact that in other words they utilized the
23 phone system, in other words if any time, I guess, an employee
24 takes an act whether disclosing information and they're at
25 work, they're utilizing the systems of their employer, it seems

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1 to me that would be -- it can't -- well. I would be skeptical
2 and I would have to see case law that says that that is
3 sufficient. And the question is what would be sufficient and
4 does the mere fact that as an incident to providing the
5 information that Mr. Eibschutz may have then done more business
6 and therefore generated fees, is that sufficient?

7 So, I really, what I need to see is case law that sort
8 of outlines exactly what would be necessary because I am
9 skeptical that the mere fact that they utilized that they were
10 at work and utilized the facilities of their employer, that
11 that would be sufficient. It may be in combination with some
12 other things, it might be, but juxtaposed against that, as I
13 heard from Mr. Fitzgerald, it sounds as if they both concede
14 that they were concerned for their -- when they were disclosing
15 the information, they were concerned about their jobs and that
16 they may have actually -- and again, subsequently, indicated
17 that they were doing it, and I don't know what the -- I'm not
18 sure -- not for NYMEX, Mr. Fitzgerald was that?

19 MR. FITZGERALD: Not for the benefit of NYMEX.

20 THE COURT: Not for the benefit of NYMEX.

21 So, I need to see information that sort of counters
22 that aspect of it. Well, are you aware of any case law
23 discussing the issue of what role -- the fact that the employee
24 utilized phone system and the like and the fact that it was
25 recorded, people often do things against their interest even

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1 though it is being recorded or even televised and I won't say
2 anything further. So, to my mind, that isn't necessarily -- it
3 might be some sort of indication but it certainly wouldn't
4 carry the day.

5 So, are you aware of any sort of the case law
6 discussing this issue in particular when are you talking about
7 vicarious liability?

8 MR. CHUDY: Yes, your Honor. If I just may respond to
9 a few points as well?

10 THE COURT: Yes.

11 MR. CHUDY: Our argument is not based solely on the
12 fact that they were doing it during regular business hours on
13 recorded lines. That certainly is a component of it. Our
14 argument is that based on a totality of the circumstances
15 including statements made by Byrnes and Curtin during the
16 course of their employment that they -- both -- objective
17 evidence shows that they were serving, indeed, some purpose of
18 NYMEX and I think that is established in the discovery record
19 by other witnesses who show that deepening this relationship
20 has a benefit for NYMEX.

21 THE COURT: Okay.

22 MR. CHUDY: And the fact that they received fees, I
23 think that is again undisputed. It is again undisputed that
24 Byrnes and Curtin were aware that Parity was a top 50 customer,
25 again relevant to their state of mind at the time rather than

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1 what they are saying three, four years later in response to a
2 request to admit served by a co-defendant.

3 There is a case I can cite to you, Judge, which talks
4 about looking at objective evidence and I will give you the
5 case cite. It is not in our letters but if your Honor would
6 like that I am happy to provide that.

7 THE COURT: That's fine. Why don't -- if you have the
8 cite you might as well put it in the record. I expect that I
9 will see it in your papers.

10 MR. CHUDY: Gibbs v. City of New York, 714 F.Supp.2d
11 419 (E.D.N.Y. 2010), and in that case the Court had held the
12 test must be an objective, not a subjective one. They were
13 analyzing the query of whether conduct was inside the scope of
14 employment under New York Law in that instance.

15 THE COURT: Okay.

16 MR. SHECHTMAN: Judge, obviously the vicarious
17 liability issue isn't mine but I might just say that from my
18 client's point of view and I think the deposition shows this,
19 the last thing in the world he thought was this is for the
20 benefit of NYMEX. He was surprised, pleasantly surprised when
21 he got this information. As you may know, he used it to yell
22 at people on his desk to say, *How come we didn't make that*
23 *trade? Why did they trade away from us?* He used it
24 unsuccessfully to try to cold call. His book was not built up
25 but I assume even if he had gotten the trade it is a zero sum

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1 game and somebody else would have.

2 So, I don't quite understand the argument that this
3 was all about fees. So, I think when you look at this
4 record -- I like these guys, I think when you look at this
5 record you are going to find very little evidence of it being
6 done on my side or on theirs for the benefit of NYMEX.

7 THE COURT: Okay. Let me ask this, Mr. Shechtman,
8 while you are up.

9 What was the relationship, because I saw a reference
10 that I thought that Mr. Eibschutz and Mr. Byrnes and Curtin
11 were friends. I don't know. What does that mean? In other
12 words, were they in fact friends or was it basically business
13 associates?

14 MR. SHECHTMAN: They were not close friends. They may
15 have attended a few sporting events together. I think the
16 record is they may have never been at each other's houses.
17 They knew of each other's families and said how are the kids.
18 And I think even before their time they engaged in locker room
19 conversation. But, I think you will not find this in any way a
20 kind of close, personal friendship.

21 THE COURT: Okay.

22 MR. CHUDY: Your Honor, may I just respond very
23 briefly to one point?

24 THE COURT: Yes.

25 MR. CHUDY: There is points about the record that I

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1 think we would disagree on, a full record, of course.

2 THE COURT: Yes.

3 MR. CHUDY: But I would like to point out the relevant
4 question is whether Byrnes and Curtin were serving any purpose
5 of NYMEX, not what Eibschutz thought Byrnes and Curtin were
6 doing.

7 MR. SHECHTMAN: And I recognize that, your Honor.

8 THE COURT: Look. I don't know what the record is.
9 It could be, though, that some of that occurred in the
10 conversations that they had. In other words, when they were
11 talking about what was going on there could be indicia of, one
12 way or the other, and I don't know what the record is in that
13 regard but let me ask Mr. Shechtman, do you have a, is it a dog
14 in this race? In other words, I didn't get any letters from
15 you so I was just wondering where you stand on this.

16 MR. SHECHTMAN: Judge, I am in this unusual position
17 and every counsel knows this -- my client's employer has
18 stopped paying him. He has got no contractual entitlement
19 through indemnification and I have stuck with him through thick
20 and thin. We are now very much at thin and he's judgment
21 proof, as far as I can tell, and I am just not going to walk
22 away from him. He is going through health scares and the like.

23 THE COURT: Sure.

24 MR. SHECHTMAN: These guys all seem to be very good
25 lawyers. I am likely to file --

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1 THE COURT: A me too?

2 MR. SHECHTMAN: A me too. If I they miss something --
3 which I doubt -- I will file, but I can tell you from my
4 client's point of view if the issue was, was this for trading
5 that certainly wasn't his purpose, and I think he has testified
6 that he finds it, as a market participant, hard to think that
7 anybody would have traded on this.

8 So, he is a strong believer in the lack of materiality
9 and if that's not made clear in these briefs we will submit
10 something short.

11 THE COURT: I can't imagine that it wouldn't be based
12 upon the letters but let me ask this because that's a good
13 segue into the materiality issue.

14 As I understand the record, Mr. Eibschutz did not use
15 the material to trade. Is everybody in agreement on that? I
16 will look to the CFTC because I think the defense would agree
17 with that.

18 MR. CHUDY: Your Honor, we have not established any
19 evidence to support that one way or the other. We do know that
20 the record does show that Eibschutz provided the information to
21 a number of his colleagues at his work. We don't know what
22 happened downstream but we are focused on the claims that we
23 charged against these defendants, not what somebody else did
24 with the information.

25 THE COURT: Is it the CFTC's contention that the

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1 information could still be material if the public would not
2 have viewed it as something that it would want to know in terms
3 of trading? In other words, I understand that it wasn't
4 traded. I don't necessarily -- and again, I haven't looked as
5 closely at the law, I don't necessarily think that that,
6 because it didn't happen, I'm not sure that carries the day
7 fully. It certainly may be an indication and certainly it
8 sounds like Mr. Eibschutz, when he didn't in his own mind, it
9 wasn't for the purposes of trading, but is the legal argument
10 that the CFTC is making is that it doesn't have to be for
11 trading in order for it to be material?

12 MR. CHUDY: That is correct, your Honor.

13 I do not believe that we need to establish that
14 somebody actually did trade on the information in order to
15 establish liability. All that is required to be shown is
16 whether or not a reasonable person would have viewed the
17 information as important to a trading decision and we think the
18 Commission regulation 1.59 provides guidance on that.

19 THE COURT: Okay.

20 Well, what would be, again, as I understand the
21 information, what is in the record that would support the idea
22 that a reasonable person in the marketplace would consider this
23 information in deciding to make a trade in the commodities
24 area?

25 MR. CHUDY: Your Honor, as we cited in our October

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1 13th letter there are -- there is deposition testimony
2 regarding witnesses who characterized the -- let me backtrack
3 for a second.

4 THE COURT: Sure.

5 MR. CHUDY: In a conversation between Eibschutz and
6 Byrnes, for example, there was a conversation on a recorded
7 line where Eibschutz characterized the information, hey, this
8 is a huge effing trade. And we also have expert testimony to
9 establish the large economic value of the trades that they're
10 discussing and as well as establish reasons we think why
11 somebody would view the information as important to making a
12 trading decision irrespective of whether or not that actually
13 did or did not occur.

14 THE COURT: Although, I guess in the context of that
15 statement, was that in connection with the trade that had
16 occurred? Is that right? In other words it wasn't a statement
17 that this could lead to a big trade because of the information,
18 it was the trade that was made was a big trade and that the
19 disclosure, whatever they were, the disclosure therefore was
20 that the trade was made for a certain quantities.

21 MR. CHUDY: I think that's correct, your Honor. A lot
22 of the trades that were captured on audio recordings pertained
23 to options so they would be exercised or expired at some point
24 in the future. So, they do give some indication about where
25 market participants may or may not be in the future.

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1 THE COURT: Just with regard to the options question
2 because I think -- well, let me ask this. With regard to the
3 options question, is there evidence in the record as to when
4 the options were -- in other words, is part of the disclosure
5 something about when the exercise date was for the options?

6 MR. CHUDY: Your Honor, the specifications of the
7 contracts, the types of contracts that were disclosed, that is
8 something that I think are standardized and available on the
9 NYMEX website. So, if you disclose a particular type of trade
10 you can go look on the website and figure out when it would
11 expire, for example.

12 THE COURT: Because I guess I view it in sort of
13 different buckets, right? There are the trades that have
14 trades and as I understand, and correct me if I am not accurate
15 in terms of what the record shows, there were disclosures that
16 related to trades that were actually done. Is that accurate?

17 MR. CHUDY: That's correct; and mostly options trades.
18 So, if a trade was, somebody purchased an option yesterday,
19 that holder of that option has a right to either buy or sell a
20 commodity product in the future.

21 THE COURT: Okay.

22 So, the disclosure, in essence, was X individual or
23 identity was purchasing has option to purchase however much of
24 a particular commodity; is that correct?

25 MR. CHUDY: They vary, Judge, but yes, that's the

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1 general concept.

2 THE COURT: Let me ask this and actually this is for
3 the defense. Options, right? It seems to me there is a
4 difference in kind between a sale that has occurred -- well --
5 and a sale that may occur in the future. In other words, when
6 you are talking about -- because now I am parsing between, and
7 I understand what the CFTC is saying they don't have to show
8 that in fact there was a trade but what I am talking about now
9 is would it be public and would someone be interested in
10 knowing that an individual is poised to or could be trading in
11 the future based upon an option?

12 Yes?

13 MR. HOGAN: Judge, Albert Hogan for NYMEX.

14 All of the trades at issue here relate to executed
15 trades. Then, in these markets, you can trade futures
16 contracts.

17 THE COURT: I see. They trade the options.

18 MR. HOGAN: You are trading the options so the futures
19 contract itself is a contract that, in the future, will
20 allow -- will require the delivery of a certain commodity. The
21 option is just another contract that allows you to purchase a
22 futures contract in the future.

23 So, Judge, really all of it relates to fully executed
24 trades with respect to market positions that may accrue out in
25 the future but the point here is unlike an equity trade, in

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1 some respects even more like an equity trade but even more so
2 in the commodities market knowing one piece of one market
3 participant's past executed trade, you have no idea what the
4 overall positions are. They may be long. They may be short.
5 This maybe to unwind a position. This may to put a position
6 on. It may be a pure hedging transaction. It may be
7 speculation. It may be a trade related to correlated markets.

8 The fact is these markets are extremely complicated
9 and to get sort of back to the discussion here, there are
10 hundreds of calls, hundreds of disclosures of information and
11 to answer your question directly, the comment about there was a
12 large trade that is absolutely backward-looking, there is not
13 one piece of evidence in the record where any of the people
14 that were engaged in these disclosures said, *wow, based on this*
15 *someone could go out and take the following position in the*
16 *market. I'm going to use this information to convince somebody*
17 *to go take this position in that market.* That discussion is
18 completely absent. And, Judge, I suppose in perhaps the only
19 respect that is the benefit of having all of these disclosures,
20 it shows you that these folks, when they were making the
21 disclosures, were not thinking about future trades in the sense
22 of using this information to trade, no discussion of convincing
23 people too trade, no discussion of receiving money based on
24 people using information to trade. These were chatter about
25 past trades so that the broker could call those people and try

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1 and take their business from one broker who was brokering with
2 NYMEX, to himself.

3 THE COURT: As I understand it there may not be case
4 law necessarily in the commodities area. Is there case law
5 that discusses this type of disclosure, in other words the
6 disclosure of an option trade and in terms of whether or not,
7 in terms of materiality?

8 MR. HOGAN: Judge, we are not aware of case law
9 specifically addressing the disclosure of a prior trade as
10 whether or not that meets the materiality standard in
11 regulation 1.59. We do believe that the general case law
12 around insider trading, first of all in the SEC context you
13 need to have actual trading.

14 THE COURT: Yes.

15 MR. HOGAN: So we think the record here, where there
16 is the absence of any trading and the action of any discussion
17 about how trading could occur, does play into the case law
18 about why trading is a required element under the SEC version.

19 THE COURT: Just to be clear -- I apologize for
20 interrupting but -- just to be clear, everybody agrees, I want
21 to make sure, that there does need to be -- in other words that
22 a reasonable person, in deciding whether to make a particular
23 trade, in other words that trading, some idea of trading,
24 whether it is explicit trading or not, would be a requirement
25 of the materiality provisions here, in other words, that there

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1 needs to be that aspect of it.

2 MR. CHUDY: Yes, your Honor. There is the commission
3 regulation speaks to that as well and has some nonexclusive
4 list of examples where the Commission has viewed that
5 information as material.

6 If I may respond to one point that Mr. Hogan had
7 indicated about no evidence in the record? There is testimony
8 from a trader who complained that his information was disclosed
9 and he was asked about why he thought this information, why he
10 might be harmed from it and he had testified that he could get
11 "run over" by someone in the marketplace.

12 So, there is a real risk of harm and other evidence in
13 the record that could establish how, why this information would
14 be important to this hypothetical reasonable.

15 THE COURT: Let me see if I have any additional
16 questions. The other issue is the scienter issue.

17 MR. ABERNETHY: Your Honor, may I comment on
18 Mr. Chudy's comments?

19 I think it may not be entirely responsive to the
20 Court's inquiry. The central issue, obviously, is materiality
21 and there is a long line of case law in the commodities and
22 securities world that holds that the definition is as you
23 articulated, the information has to be important to a
24 reasonable trader contemplating trading a commodity interest
25 but the Commission, I think, is urging the Court to adopt a

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1 different reading of CFTC Regulation 1.59 and that is that list
2 of items relating to, in the second sentence of 1.59 (a)(5) and
3 they list current and anticipated futures positions, trading
4 strategies and the financial condition of a firm, is material
5 information. So, they're expanding that definition because
6 they are arguing, as I understand it, that even if this
7 information about a current or anticipated futures position is
8 not of importance to a trader in making a decision to trade a
9 commodity interest, that this information is material.

10 So, I think they're expanding or trying, proposing
11 that this Court expand the definition of materiality and in so
12 doing they are reversing decades' old interpretations by the
13 Commission of its own regulation which is simply that it is
14 material information, simply information that would be
15 important to a trader.

16 This is, in our view, an unconsidered, expedient
17 litigation posture and unpersuasive interpretation of
18 Regulation 1.59.

19 THE COURT: I apologize for interrupting because that,
20 I mean you stated it, that's sort of the question I was getting
21 at. In other words, is it the position -- because I think as
22 you stated, is it the CFTC's position that absent the trading
23 aspect of it that there still is an argument for the
24 information being material? In other words, I think as
25 Mr. Abernethy just articulated in referring to the list of

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1 items under 1.59, is it the CFTC's position that the fact that
2 it involves sort of a position of an entity and the like, even
3 if it wouldn't be necessarily something that a reasonable
4 person would be interested in in terms of trading, that that is
5 still material? In other words without that trading aspect of
6 it?

7 MR. CHUDY: Your Honor, with respect to Commission
8 Regulation 1.59, again, we think the plain language speaks for
9 itself. It does define material information as information
10 that would be important to a reasonable investor making a
11 trading decision. That language is there. Counsel is asking
12 you to completely ignore the second sentence that illustrates
13 information that the Commission has traditionally viewed as
14 examples of that sort of information and I think the reference
15 to the Commission rule writing process that Mr. Abernethy is
16 referring to relates to a discussion on a separate aspect
17 called linked exchanges.

18 So, there was a debate about this Commission rule to
19 determine whether or not to add certain categories of
20 information to this definition or to exclude it. So, for
21 example, with respect to margin, there was a discussion whether
22 or not the word "margin" should be added to the definition in
23 the second sentence and the Commission considered the fact that
24 they should not include it so market participants had indicated
25 that having that language in there would suggest that it would

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1 always be considered material. By contrast, with the linked
2 exchange sentence that Mr. Abernethy refers to, I think there
3 were also some discussion about whether or not that type of
4 information would typically be considered important to making a
5 trading decision and the Commission decided to keep that
6 language in there and had indicated with respect to that
7 component that you still need to establish materiality with
8 respect to it being reasonable to -- excuse me, with respect to
9 information being important to a reasonable investor in making
10 a trading decision.

11 So, I don't think we are being inconsistent. We are
12 asking the Court to look at the plain language of the
13 regulation. To the extent that that doesn't persuade you, your
14 Honor, we have cited evidence in the record to establish,
15 independent of the reading of the regulation, why we believe
16 that materiality is established, and if it is not an issue for
17 summary judgment then it is -- materiality -- is typically a
18 question of fact.

19 THE COURT: Okay.

20 MR. ABERNETHY: Your Honor, I think the context in
21 which the Commission reiterates its position on the definition
22 of materiality used in 1.59 is irrelevant. And indeed, yes, I
23 was referring to that comment but I am also referring to the
24 comment in the notice of proposed rulemaking in 1985 which I
25 shouldn't say again because that predates the 1993 statement

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1 that we are talking about. They, again, state what their
2 definition of materiality is.

3 If I may, your Honor, I would like also to make a
4 comment about the individual who said he might be run over.
5 When he made that comment he had only heard rumors that
6 information about his trading had been disclosed and his
7 comment was if they knew my position, I could be run over.

8 THE COURT: Overall position.

9 MR. ABERNETHY: Overall position, or maybe a position
10 in a particular structure or something like that. And we can
11 argue about whether or not that is important to a trader.
12 Evidently to that trader his view is it is. But, the
13 information that was disclosed here was not about positions, it
14 was about price, quantity, structure and the trader.

15 So, it is a little bit misleading to say that the
16 comment by this trader is evidence of the importance of the
17 information that was disclosed.

18 THE COURT: All right.

19 MR. ALLGOR: Your Honor, I might add, I am pretty sure
20 that same witness later on, when confronted with the precise
21 nature of the disclosures said, oh yeah, that's not useful for
22 running me over in later testimony.

23 THE COURT: So, obviously I think I will need to have
24 all of this before me. Let's talk a little bit about -- I
25 mean, as I understand the -- it seems too me that obviously

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1 materiality is going to be an issue. The issue of scienter is
2 going to be an issue. It also seems to me that as we
3 discussed, the vicarious liability is going to be an issue for
4 the reasons that we have had a discussion on. It sounds like
5 there is not a substantial amount of case law, at least in this
6 specific context. Obviously I would expect the parties, to the
7 extent that if there are analogous situations, that the parties
8 can point to in the SEC context and otherwise -- and I
9 recognize the law may not be perfect analogy -- they should
10 absolutely do that.

11 Now, in terms of briefing, and in particular I would
12 like to make a comment about 56.1 statements and by my comments
13 I am not saying that any of the parties would do this, but I
14 ask you to pay careful attention to what 56.1 is about. It is
15 about facts and disputed facts, not about arguments, not about
16 anything else.

17 So, it is to aid me in reaching a decision and in that
18 way saying what facts are in fact not disputed. I have, at
19 times, had parties submit -- well, I will give you the most
20 egregious example, where a party in a 56.1 statement -- and
21 there could be circumstances where this happens but I think it
22 should be rare -- where every single fact was disputed even
23 within large parts of it and then, within that, there are also
24 citations to the record that didn't support the fact that they
25 were certain. And so, what it caused us to have to do,

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1 although I wonder whether I really even needed to, but it
2 causes actually having to go literally check every single thing
3 that was cited in order to get to the bottom of this.

4 So, the only reason why I raise it is it is an
5 unbelievably helpful aid to us in parsing through the record
6 and knowing what facts are not disputed. Having said that, I
7 recognize that you are obviously -- this is an adversarial
8 process so I am not expecting you to agree to a fact that
9 clearly you don't believe is undisputed, but I just ask you to
10 pay careful attention to the purpose of 56.1 and to the
11 extent -- obviously, I am not limiting you to make your
12 arguments in the appropriate places but -- let me put it to you
13 this way. If, in fact -- you shouldn't, and I don't want to
14 invite more pages, but you shouldn't use the fact that the
15 56.1, I think -- am I correct, there is nothing in our
16 individual rules that limit the size of a 56.1.

17 So, look. If you need more pages, obviously, ask for
18 more pages. And don't use 56.1 to make statements because you
19 couldn't fit it in your brief or something like that. Again, I
20 am not saying that any of the parties here would but that
21 shouldn't be a reason for it. And, again, I am in no way
22 suggesting that any counsel here would do that but it is sort
23 of preventive on my part.

24 Yes, Mr. Abernethy?

25 MR. ABERNETHY: Your Honor, maybe this is not the

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1 appropriate time but you have not mentioned anything about the
2 Daubert motions that some of us have proposed.

3 THE COURT: Let me ask you this. In connection with
4 the summary judgment motions, and I know there are references
5 to experts in the parties' papers, is the intention of the
6 parties to rely on their experts in connection with the summary
7 judgment motions?

8 MR. ABERNETHY: Your Honor --

9 THE COURT: Let me hear from the CFTC first and then I
10 will hear from the defense.

11 MR. CHUDY: Your Honor, in connection with an
12 affirmative motion I would anticipate that we would not. I
13 think it was more of a textual argument that we made under the
14 plain language of the regulation. To the extent we were to
15 oppose the summary judgment we would like to obviously reserve
16 the right to rely on an expert there.

17 THE COURT: So not affirmatively but perhaps, if need
18 be, in response to arguments that the defense makes on their
19 summary judgment motions; is that accurate?

20 MR. CHUDY: That's correct, your Honor. And we would
21 also point out further that to the extent summary judgment is
22 based on having sufficient evidence, I think we can establish
23 materiality without relying on it and we think that expert
24 motions are premature at this point but we will take direction
25 from your Honor as to how to approach that.

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1 THE COURT: Let me hear from defendants.
2 Mr. Abernethy?

3 MR. ABERNETHY: Your Honor, we absolutely are going to
4 depend on our expert Robert Silvay who is an individual with
5 more than 20 years of experience as a trader and a broker in
6 the natural gas and crude oil energy markets. He has testified
7 unequivocally that the information that was disclosed would not
8 be useful to a trader, that the knowledge that came from these
9 disclosures would not enable a person to determine whether a
10 position was being put on, taken off, increased, decreased,
11 what future trading intentions might be revealed, or if any
12 intervening trades had taken place.

13 So, we absolutely depend upon Mr. Silvay's testimony
14 for establishing that the information that was disclosed is not
15 material.

16 With respect to the Commission's expert, we feel that
17 he should be disqualified because he admitted in his own
18 testimony that if he had the information he wouldn't know what
19 to do with it and he stated, also, that only a trader would
20 know whether or not this information is important in
21 considering whether or not to trade a commodity interest.
22 Consequently, we feel that any testimony that he might offer or
23 that the Commission might choose to use in a motion would be
24 inadmissible and shouldn't be considered by the Court. If the
25 Commission would be willing to go one step further and say that

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1 they would not use his testimony -- which apparently they have
2 some -- don't have a great deal of confidence in or I think
3 they would have used it more in their letters -- but if they
4 would be willing to stipulate that not only would they not use
5 it to support their own motion for summary judgment but not use
6 it in opposition to summary judgment motions made by the
7 defendants, then we would be willing to postpone our motion to
8 disqualify him. But, if they intend to use that testimony in
9 their motion for summary judgment or in opposition, then we
10 would like to make that motion to disqualify him at this time.

11 THE COURT: Okay.

12 From what I heard the CFTC saying was that -- and I
13 suspect the response is going to be, well, we don't know
14 exactly what the motions are going to look like so we can't say
15 exactly what we are going to say in response but at least I
16 heard them say, let me just confirm, that in connection with
17 the affirmative motion that you would make that the CFTC wasn't
18 planning on relying on its expert in connection with that.

19 MR. CHUDY: That is correct, your Honor; and I think
20 your characterization of our position is accurate. We
21 obviously vehemently disagree with the characterizations by
22 Mr. Abernethy. Our expert, Dr. Hank Bessembinder, has
23 repeatedly been qualified as an expert in numerous trading
24 matters including cases that have been in the press, Oystacher
25 and Coscia, and to the extent they're taking out sound bytes to

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1 try to make the testimony look bad at this point are taken out
2 of context and completely disregard his methodology that he
3 used to express his opinions.

4 THE COURT: Let me put it to you this way. My
5 inclination is not to make a ruling on the -- and I will hear
6 from the parties on this -- not to make a ruling on the motion,
7 the Daubert motions. This is just an observation but if you
8 need to, if what you are left with resorting to is experts
9 battling back and forth that might be an indication that
10 perhaps it is not an issue that necessarily is ripe for summary
11 judgment, putting aside whether or not that expert is going to
12 be able to testify in a trial. I mean, I am speaking a little
13 bit in the dark here because I don't know exactly what the
14 actual summary judgment briefing is going to look like and what
15 the actual testimony that the expert is being offered to
16 support is or to rebut a particular summary judgment argument.

17 So, that's my initial thought; that I would proceed
18 with the summary judgment. If I, in reviewing the papers it
19 occurs to me that, boy, I need to get more information on the
20 experts, I will ask for that, in other words make a ruling on
21 that.

22 Do any of the parties see any issue with the way I
23 intend to proceed? I understand the desire to deal with the --
24 but it is not even clear to me -- well, let me ask this,
25 actually. Mr. Abernethy, you did indicate that you intend to

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1 rely on your expert. In the affirmative motions by the other
2 defendants do you also intend to rely on experts that you have?
3 Perhaps this is an easier way.

4 What is the CFTC's position with regard to the expert
5 that Mr. Abernethy has put forward or any other -- in other
6 words is there Daubert challenges to Mr. Abernethy's and other
7 experts?

8 MR. CHUDY: Yes, your Honor, I anticipate there would
9 be but it is something that could be dealt with later on. If
10 the sole piece of evidence that Mr. Abernethy relies on is an
11 expert to try to establish confidentiality then I would imagine
12 that we may try to challenge that but there is ample evidence
13 in the record to show that there is a question of -- assuming
14 you credit his expert, there are issues of fact that won't
15 necessitate doing that until trial.

16 THE COURT: I am not inclined to have the briefing
17 either simultaneous or to take care of the Daubert issue at
18 this stage. I will take a look at the summary judgment papers,
19 as I said, and I am skeptical that if what is happening is a
20 battle of experts, that that would be something that would
21 necessarily be ripe. And I haven't looked again at the case
22 law to ferret out when cases are faced with this situation on
23 summary judgment where what you have boils down to a battle of
24 experts. Don't get me wrong, there may be situations in that
25 context where you do need to make the Daubert ruling because

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1 one side or the other is not appropriate expert testimony. So,
2 I am not precluding that issue but where there are experts that
3 appear to be just at loggerheads, that might be an indication
4 that perhaps it is not ripe for summary judgment. But, I'm not
5 going to schedule briefing on the Daubert motion at this stage.

6 Have the parties discussed timing of briefing and
7 sequencing of briefing? I see a chart, Mr. Chudy. Is that
8 a --

9 MR. CHUDY: It is a calendar, your Honor. The parties
10 have discussed a briefing schedule generally and I don't want
11 to speak for everyone else, but I think we had anticipated
12 proposing certain dates and, again, counsel can speak up if I
13 am not characterizing this correctly, but December 15th for
14 opening motions; February 15th for opposition to; and March
15 17th for replies. We had not gotten into the level of detail
16 to discuss sequencing but I am happy to take direction from
17 your Honor on that as well.

18 THE COURT: Let's first talk in terms of the dates
19 that were just indicated. So, the 15th for opening. Does that
20 work for all defense counsel?

21 MR. FITZGERALD: Yes, your Honor. I believe so.

22 If I might, just so we are clear because Mr. Abernethy
23 flagged a motion, the Daubert motion, he wanted to make sure
24 they were for NYMEX, we want to address the issue of vicarious
25 liability which we think is critical and we think it might moot

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1 the second motion, but the other motion we intend to address is
2 summary judgment on the injunctive relief. In our view where
3 there is vicarious liability we think injunctive relief is
4 inappropriate. If we are going to make a no-name illusion to
5 occurring events, like telling an NFL owner that one of his
6 players are actually kicking it, despite being told not to,
7 that the owner is in contempt. In our view we don't think
8 NYMEX should be held vicariously liable for what employees did
9 against the rules, but to invoke an injunctive relief from a
10 Court which would imply strict liability, that if another
11 employee broke the rules that we would be in contempt of Court
12 we don't believe would be appropriate.

13 So, when we frame the motion we envision having that
14 motion as well as the vicarious liability motion.

15 THE COURT: I think that was something that was in
16 your correspondence.

17 MR. FITZGERALD: Yes.

18 THE COURT: That's fine, and I think that that makes
19 sense. So, 12/15 is okay, and then the opposition would be
20 February 15th, and then replies the 17th of March.

21 Okay. Sequencing. I was thinking about this earlier
22 and trying to figure out how to limit amount of paper but I am
23 not sure what the best way would be. I mean I know that there
24 are times when some of my colleagues direct that you try and
25 file a joint brief. I am not sure how much, necessarily

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1 effective that would be but I am not sure -- did the defendants
2 have any thoughts in this area? Had you discussed whether or
3 not, and particularly whether it is the individual defendants
4 and NYMEX, have you discussed whether there is a means where
5 there could be a brief? There obviously is overlap in many of
6 the issues and so what I am trying to avoid is the need for
7 people to be repeating the same arguments.

8 Mr. Fitzgerald.

9 MR. FITZGERALD: Speaking for NYMEX, I think we would
10 all like to avoid needless duplication for vicarious liability
11 and injunctive relief. That is our issue. We understand there
12 are other issues that we may not join in in a giant brief. We
13 would like to do that, if we can.

14 THE COURT: I think that's the way we should proceed
15 rather than forcing the parties to basically submit unified
16 briefs. I am still learning in this job and it may be in a
17 year or two years, or maybe even six months after I get your
18 briefs that I want to have it combined, but I think that's
19 fine.

20 So, obviously, be in touch with one another so you
21 recognize what the arguments are and it is fine to do -- I know
22 Mr. Shechtman is going to do a me too but joining in others'
23 briefing is fine and I think that makes sense. So that you can
24 each file your own papers but it may be that on certain
25 arguments you say I am joining in on the argument whether it is

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1 vicarious liability or the materiality argument, Mr. Fitzgerald
2 for some of the individuals, I understand that would be fine so
3 you don't need to fully brief that out.

4 Is there anything else that we have to deal with
5 today? From the CFTC?

6 MR. CHUDY: No, your Honor.

7 THE COURT: From the defense?

8 MR. ABERNETHY: No, your Honor.

9 MR. FITZGERALD: Your Honor, I guess there is one
10 question in terms of if we are going to be doing materiality
11 briefing on the case. We don't have a clear understanding of
12 whether if this goes to trial whether we are looking at 90
13 violations in front of a jury or 527 or 72.

14 THE COURT: Okay.

15 MR. FITZGERALD: So, it would be useful to know what
16 we are shooting at. It goes to materiality if whether we are
17 taking each data point as separate violations or a collection
18 of data points as one violation. We don't want to shoot at the
19 wrong target in our brief.

20 THE COURT: I saw reference in your letter to
21 different points in time so let me ask the CFTC, is it nailed
22 down to the 90? I know that is a reference in the pre-motion
23 letter.

24 MR. CHUDY: Your Honor, in the pre-motion letter the
25 reference to 90 was the 90 instances of audio recordings for

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1 example and each audio recording may have had multiple
2 disclosures on that and I think we made that quite clear in
3 response to interrogatories served by NYMEX that we were
4 counting violations by disclosure of counter-party trade. So,
5 for example, on one audio recording, if Byrnes or Curtin made a
6 disclosure to Eibschutz about five trades there is multiple
7 disclosures on that call, it is not just the one audio
8 recording. So, I think we have explained that and our position
9 is that we are taking, counting each separate disclosure as a
10 violation. We are happy to discuss with NYMEX further to try
11 to, as they say, pin down what they're shooting at.

12 THE COURT: I think that makes sense.

13 Look, I think what needs to happen is -- and it may be
14 that there is an entire agreement that within the 90, it sounds
15 like that is the -- it is within those 90 calls; is that
16 accurate?

17 MR. CHUDY: That is accurate, your Honor.

18 THE COURT: Okay. So, within that there may be
19 multiple times when there were disclosures so I don't know,
20 Mr. Fitzgerald, whether it is 90, whether that answered the
21 question. In other words, as I understand counsel for the CFTC
22 it is those 90 recorded calls. There may be multiple
23 disclosures within that. If the 90 isn't sufficient I ask the
24 parties to meet and confer, well, on call one we have three
25 disclosures. In other words, do you need more than that I

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1 guess is the question.

2 MR. FITZGERALD: I think what I would like to do is
3 confer with the CFTC and counsel.

4 THE COURT: Yes.

5 MR. FITZGERALD: I don't think we have enough for what
6 we need but I also don't want to try to figure that out on our
7 feet in your Honor's courtroom now.

8 MR. ABERNETHY: Your Honor, we agree with that as
9 well.

10 THE COURT: Because I think this is something that
11 sounds like the parties can work out, in other words, and
12 figure out what is in play and what is not in play. In
13 particular -- and this is the reason I think why it can be
14 important. It may be that there may be an argument that with
15 regard to 30 of the calls -- I mean, there may be differences
16 between, in the disclosures themselves so it is important for
17 the parties to have a sense of that and if you are actually
18 going to ask me to go disclosure by disclosure and make
19 rulings, and I don't know whether that's the case, you need to
20 be on the same page as to what the disclosures are.

21 MR. CHUDY: Understood, your Honor.

22 THE COURT: Okay? All right.

23 Anything else? CFTC?

24 MR. CHUDY: No, your Honor.

25 THE COURT: From the defense?

GAK5cftC

1 MR. FITZGERALD: No, your Honor.

2 THE COURT: All right. Thank you very much for coming
3 in and we will stand adjourned.

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